No. 14,917

In the

United States Court of Appeals

For the Ninth Circuit

California State Board of Equalization,
Appellant,

vs.

George T. Goggin, Trustee of the Estate of Columbia Stamping and Manufacturing Corporation, Bankrupt,
Appellee.

Appellant's Opening Brief

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES

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PRELIMINARY JURISDICTIONAL STATEMENT

The within appeal is taken pursuant to an Order of this Court filed April 4, 1956, upon appellant's petition pursuant to section 24(a) of the Bankruptcy Act, 11 U.S.C., section 47(a), for the allowance of an appeal from an order (Tr. 100) of the United States District Court for the Southern District of California, Central Division, entered on June 20, 1955. The District Court denied appellant's petition for review of an order (Tr. 79) entered by the Honorable Hugh L. Dickson, Referee in Bankruptcy, enjoining appellant from enforcing provisions of the California Sales

and Use Tax Law with reference to tangible personal property purchased by the Milton J. Wershow Company from George T. Goggin, Trustee in Bankruptcy of the Estate of Columbia Stamping and Manufacturing Corporation, Bankrupt.

STATEMENT OF THE CASE

The State of California imposes a three percent use tax on persons storing or using tangible personal property in this State. The use tax is imposed on the purchaser rather than on the seller. This case involves the validity of an order of the referee in bankruptcy, confirmed by the District Court, permanently enjoining the State of California and the State Board of Equalization from collecting a use tax *from private persons who were not parties to the bankruptcy proceeding* with respect to items purchased by such private persons from George T. Goggin, the Trustee in Bankruptcy of Columbia Stamping and Manufacturing Corporation, who was liquidating the assets of the bankrupt, and also enjoining the State of California and the California State Board of Equalization from collecting such use tax from George T. Goggin, Trustee in Bankruptcy, either in his capacity of trustee or in his individual capacity (Tr. 79). The order of the referee was issued nine months after the items sold by the trustee had ceased to be a part of the bankrupt estate.

The issues presented in this case are as follows:

1. Does the bankruptcy court have jurisdiction to enjoin the State of California from collecting a use tax, imposed on the privilege of using tangible personal property in this State, from persons who are not parties to any bankruptcy proceeding solely because the tangible personal property had been acquired from a trustee in bankruptcy liquidating the assets of a bankrupt estate?

2. If the answer to the above question is in the negative, it is necessary to consider if it would be contrary to the provisions of the Bankruptcy Act for the trustee in bankruptcy to be required to collect the use tax from the purchaser and transmit it to the State of California.

There does not appear to be any dispute as to the operative facts of this case which are as follows:

Columbia Stamping and Manufacturing Corporation, the bankrupt herein, filed its petition under the provisions of Section 322 of the Bankruptcy Act on October 29, 1946. On or about February 27, 1947, the petition for arrangement having failed, an order was made adjudging Columbia Stamping and Manufacturing Corporation, a bankrupt, and directing that bankruptcy be proceeded with. On or about October 29, 1946, George T. Goggin became the duly appointed, qualified and acting receiver herein, and on or about March 3, 1947, he became the duly appointed, qualified and acting trustee herein (Tr. 70).

Prior to the date of bankruptcy, Columbia Stamping and Manufacturing Corporation was engaged in the stamping and manufacturing business. The operation of this business was continued by George T. Goggin as receiver and, subsequently, as trustee from the date of bankruptcy to January 5, 1954. The referee in bankruptcy, on January 5, 1954, orally directed liquidation of the assets of the bankrupt estate and confirmed a sale of all or substantially all of the physical assets of the bankrupt estate to Milton J. Wershow Company, a copartnership composed of Milton J. Wershow and Gladys R. Wershow. A written order confirming the sale was entered on or about the 13th day of January, 1954. Included in assets sold to the Milton J. Wershow Company were items of tangible personal property valued in the sum of $10,620.23, all of which had been

used by the trustee in the operation of the business. The items of tangible personal property were not purchased for resale by the Milton J. Wershow Company but were purchased for use by that Company and were actually used by the Company in this State. The tax thereon under the provisions of California Sales and Use Tax Law (California Revenue and Taxation Code, sections 6001, et seq.) if applicable, amounts to $318.61 (Tr. 71).

The personal property involved in the instant case had been used by the appellee, George T. Goggin, for a period of approximately seven (7) years immediately preceding January 5, 1954, first as receiver and then as trustee of the bankrupt estate in the course of the operation of the business of the bankrupt. In operating the business of the bankrupt during this period, the appellee, George T. Goggin, regularly made numerous sales of tangible personal property at retail and paid sales taxes thereon to the California State Board of Equalization. It is not disputed that George T. Goggin was a retailer throughout the period in which he operated the business of the bankrupt (Tr. 51, 52, 101).

No tax or debt of any kind, based on the sale by George T. Goggin to the Milton J. Wershow Company, or based on the storage, use or other consumption in the State of California of the aforesaid personal property by that Company, has been paid to either the State of California or the Board of Equalization by either the trustee or the Company; and no sum was collected by the trustee from the Company for any such tax (Tr. 72).

The Board of Equalization is the duly constituted administrative agency of the State of California, charged with the enforcement of the provisions of the California Sales and Use Tax Law (California Revenue and Taxation Code, Sec-

tion 6001, et. seq.) and the collection of the taxes imposed thereunder (Tr. 72).

On or about April 15, 1954, George T. Goggin filed a petition with the Bankruptcy Court for an order enjoining the State of California from asserting any tax or claim against the Milton J. Wershow Company on the property which that Company had purchased on January 5, 1954, and enjoining the State of California from asserting any tax or claim against George T. Goggin, the Trustee in Bankruptcy because of this transaction (Tr. 42). On October 22, 1954, the Honorable Hugh L. Dickson, Referee in Bankruptcy, entered an order permanently enjoining the State of California and the State Board of Equalization "from collecting, or attempting to collect from George T. Goggin, either as trustee of the estate of Columbia Stamping and Manufacturing Corporation, Bankrupt, or individually, or from Milton J. Wershow Company * * * any tax or debt of whatsoever nature arising from, or based upon any of the provisions of the Sales and Use Tax Law of the State of California" with respect to the property purchased by the Milton J. Wershow Company on January 5, 1954, which is referred to above (Tr. 79). The California State Board of Equalization petitioned for a review of this order. On June 20, 1955, the petition for review was denied by the Honorable Ben Harrison, one of the judges of the United States District Court for the Southern District of California, Central Division, and the order of the referee in bankruptcy was confirmed, ratified and approved (Tr. 100).

SPECIFICATION OF ERRORS

1. The court below erred in concluding that it had jurisdiction to enjoin the State of California and the California State Board of Equalization from collecting from the Milton

J. Wershow Co. use tax imposed for the privilege of using tangible personal property in this State.

2. The court below erred in concluding that the State of California was and is prohibited by the Constitution and the laws of the United States from taxing the storage, use or other consumption of tangible personal property purchased from a trustee in bankruptcy. The court erred in including a statement to this effect in its findings of fact (Finding IV, p. 72) since this is clearly a conclusion of law on one of the legal issues here involved.

3. The court below erred in holding that requiring either Mr. Goggin, in his fiduciary or individual capacity, or his vendees to comply with the use tax provisions of the California Sales and Use Tax Law would constitute an unlawful interference with the administration of the Bankruptcy Act.

4. The court below erred in permanently restraining the State of California, and its duly constituted agency, the California State Board of Equalization, from enforcing the use tax provisions of the California Sales and Use Tax Law against Mr. Goggin in his individual, as well as fiduciary capacity, or against said Milton J. Wershow Company and/or its individual partners.

5. The court below erred in overruling the objections of the State of California, and its duly constituted agency, the California State Board of Equalization, to the jurisdiction of the court below in this matter.

6. The court below erred in failing to recognize that the Milton J. Wershow Company was subject to the California use tax by virtue of purchasing tangible personal property from a retailer for use in this State, and using such property in California.

7. The court below erred in failing to recognize that it is the buyer who is liable for the use tax imposed by the

California Sales and Use Tax Law upon the storage, use or other consumption of said tangible personal property by the buyer in California and that the seller is obligated to collect the tax from the buyer and remit it to the State.

8. The court below erred in failing to recognize that it was enjoining the collection of a tax which was not imposed upon appellee or the bankrupt estate involved herein or upon any of the assets belonging to said estate.

9. The court below erred in holding that none of the use tax provisions of the California Sales and Use Tax Law apply to George T. Goggin either in his individual capacity or as trustee in bankruptcy, or to the purchaser, the Milton J. Wershow Company, with regard to the transactions involved herein.

ARGUMENT

I. Summary of Argument

The two primary issues involved in this case are:

(1) Does a bankruptcy court have jurisdiction to enjoin the State of California from collecting a use tax from a person who purchases property from a trustee in bankruptcy who is liquidating the assets of a bankrupt estate?

(2) May a trustee in bankruptcy be required to collect the use tax from a purchaser and transmit this tax to the California State Board of Equalization?

The California use tax is imposed for the privilege of storing and using tangible personal property in this State (*Southern Pacific Co. v. Gallagher,* 306 U.S. 167, 59 Sup. Ct. 389). The legal incidence of the tax is on the purchaser of the property and the liability for tax arises because of his use of the property in this State (California Revenue and Taxation Code, sections 6201, et seq.; *Southern Pacific*

Co. v. Gallagher, supra; Chicago Bridge & Iron Co. v. Johnson, 19 Cal. 2d 162, 119 Pac. 2d 945).

The jurisdiction of the bankruptcy court may not extend to property which has ceased to be a part of the bankrupt estate (*In re Oak Park Cleaners and Dyers,* 125 F.2d 420 [Seventh Circuit]). It is clear, therefore, that a court of bankruptcy is without jurisdiction to enjoin the collection of a use tax from a person using tangible personal property in this State who is not a party to the bankruptcy proceeding merely because the property, prior to the time it was purchased and used, had been part of the bankrupt estate. It follows that the bankruptcy court in the instant case was without jurisdiction to enjoin the State of California from collecting use tax from the Milton J. Wershow Company.

The effect of the order of the bankruptcy court is to prevent the State of California from collecting a tax which is properly due and owing from the purchaser. The purchaser, Milton J. Wershow Company, was subject to the California use tax for the privilege of using tangible personal property which it purchased from a retailer for use in this State (California Revenue and Taxation Code, Section 6201, et seq.).

It remains to consider if George T. Goggin, the trustee in bankruptcy, may be required to collect the use tax from the Milton J. Wershow Company and transmit the tax to the State of California. Under the provisions of the California Sales and Use Tax Law, a retailer maintaining a place of business in this State is required to collect the use tax from a purchaser who is purchasing for use in this State and to transmit the tax so collected to the State of California (California Revenue and Taxation Code, section 6203). Since George T. Goggin, at the time he made the sale here in controversy, was a retailer maintaining a place of busi-

ness in California, he should have collected the use tax. Doing so would not interfere with the performance of his functions under the Bankruptcy Act. In *New York v. Jersawit,* 85 F.2d 25 (Second Circuit), it was expressly held that the collection by a trustee in bankruptcy liquidating the assets of a bankrupt estate of a sales tax imposed on the purchaser would not interfere with the performance of the trustee's functions and that the trustee should be required to collect such tax.

The collection of the use tax by the trustee will not interfere with his ability to dispose of the assets of the bankrupt estate since the purchaser will be required to pay the same amount of use tax regardless of whether the tax is collected from him by the trustee in bankruptcy or is collected from him directly by the State of California. Accordingly, the order of the court below should be reversed and the appellant should be permitted to enforce the provisions of the California use tax law with respect to the transaction here involved.

II. The California Use Tax Is Imposed on Purchasers for the Privilege of Using Tangible Personal Property in This State

Since this case involves the application of the California use tax, it is desirable at the outset to explain briefly the nature and incidence of that tax.

The use tax is imposed pursuant to Section 6201 of the Revenue and Taxation Code which, so far as here relevant, provides:

> "An excise tax is hereby imposed on the storage, use, or other consumption in this State of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this State at the rate of three percent of the sales price of the property. * * *"

Section 6008 defines "storage" as "any keeping or retention in this State for any purpose except sale in the regular course of business or subsequent use solely outside of this State of tangible personal property purchased from a retailer".

Section 6009 defines "use" as "the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it does not include the sale of that property in the regular course of business."

It is apparent from these statutory provisions that the California use tax is imposed on the purchaser rather than on the seller and that it is the activity of the purchaser in storing or using the property in this State after its purchase which gives rise to the liability for this tax and the United States Supreme Court so held in *Southern Pacific Co. v. Gallagher,* 306 U.S. 167, 59 Sup. Ct. 389.

The use tax is designed to complement the sales tax and to prevent discrimination against local suppliers. *Chicago Bridge and Iron Company v. Johnson,* 19 Cal. 2d 162, 165, 119 P.2d 945, 947. It is frequently applied in situations where items are purchased in another state and brought into California to be used here, i.e., an automobile purchased in Detroit by a California resident for use in this state. The Supreme Court of the United States has recognized that because of the difference in legal incidence of the sales and use tax, a use tax may be imposed under circumstances in which the imposition of the sales tax would be barred by the provisions of the federal Constitution (*General Trading Co. v. Tax Comm'n,* 322 U. S. 355, 64 Sup. Ct. 1019; Cf. *McLeod v. Dilworth Co.,* 322 U. S. 327, 64 Sup. Ct. 1023). In *McLeod v. Dilworth,* 322 U. S. 327, at 330, 64 Sup. Ct. 1023, at 1026, the Court said:

"* * * A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. * * *

"* * * Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated taxes on different transactions and for different opportunities afforded by a State."

It is apparent from the foregoing discussion that the use tax is an excise tax imposed on the purchaser, as contrasted with a sales tax imposed on a retailer. The legal incidence of the two taxes is different and this difference in legal incidence has been recognized as significant by the United States Supreme Court in determining the validity of the imposition of such taxes.

The significance of the legal incidence of a tax was also recognized in *City of New York v. Jersawit,* 85 F.2d 25 (Second Circuit). The *Jersawit* case presented an issue similar to that involved in the instant case, namely: whether a trustee in bankruptcy making sales in the liquidation of the assets of a bankrupt estate is required to collect a tax imposed on purchasers. The Court held that the trustee should collect the tax. In that regard, the Court said:

"* * * A tax on a sale made by a trustee under an order of court for purposes of liquidation if payable directly and primarily by him would doubtless be a burden on a governmental instrumentality, for a judicial sale in liquidation of a bankrupt estate would in a peculiar sense involve the exercise of a federal function. Indeed, without the exercise of such a function and the power thus to dispose of assets, administration in bankruptcy would hardly be practicable. A tax on the vendee in

connection with a sale in liquidation of a bankrupt's estate is, at least in a formal sense, quite different from a tax for which the vendor is made primarily liable. Not only would the tax be on the purchaser, rather than the trustee, but it would be a tax equivalent to that imposed on all persons in the community similarly situated. It is the policy of the courts ordinarily to treat such general taxes as valid. The limitation of exemptions to taxes directly and substantially interfering with government functions is being adhered to with more and more strictness. Indian Territory Illuminating Oil Co. v. Board of Com'rs, 288 U. S. 325, 53 S. Ct. 388, 77 L.Ed. 812; Fox Film Corp. v. Doyal, 286 U. S. 123, 52 S.Ct. 546, 76 L.Ed. 1010; Helvering v. Powers, 293 U. S. 214, 55 S.Ct. 171, 79 L.Ed. 291; United States Trust Co. v. Anderson (C.C.A.) 65 F. (2d) 575, 89 A.L.R. 994.

"The purchaser at the judicial sale was only required to pay the same tax he would have been bound to pay if he had purchased from anyone else. What the trustee is really complaining of is, not that a burden has been imposed upon the exercise of his functions, but of his inability to sell to a purchaser who would be exempt from a tax and because of such an exemption would pay a higher price to him than would ordinarily be paid for the goods sold. It seems unreasonable to treat the absence of an exemption from taxes as a burden upon the normal exercise of a governmental function." (85 F.2d 25, at 27)

We have stressed the fact that the legal incidence of the California use tax is on the purchaser and not on the seller because the bankruptcy court in the instant case failed to recognize this. The bankruptcy court based its order on the erroneous conclusion that the decision of this Court in *California State Board of Equalization v. Goggin,* 191 F.2d 726, which related solely to the imposition of a sales tax on a

trustee in bankruptcy liquidating a bankrupt estate, was controlling in the instant case which involves the imposition on the purchaser of the use tax for the privilege of using in this state property purchased from a trustee in bankruptcy.

III. The Bankruptcy Court Has No Jurisdiction to Enjoin the State of California from Collecting a Use Tax from Persons Using Property Purchased from a Trustee in Bankruptcy

In October, 1954, the bankruptcy court permanently enjoined the State of California and the California State Board of Equalization from collecting, or attempting to collect, use tax from the Milton J. Wershow Company for exercising the privilege of using in this State the tangible personal property purchased by that Company from George T. Goggin in January of 1954 (Tr. 79). (Our prior discussion has shown that the liability of a purchaser to pay the California Use Tax arises because of his activities in storing or using such property after its purchase.) Thus, approximately nine months after certain assets ceased to be a part of the bankrupt estate, the bankruptcy court permanently enjoined the State of California from collecting a tax from a person who was not a party to a bankruptcy proceeding—a tax which resulted from activities of the purchaser wholly unrelated to the bankruptcy proceeding, namely, the purchaser's storage and use of the property in California after its purchase from the trustee in bankruptcy.

The first question which must be considered is whether a court of bankruptcy has jurisdiction to enjoin the collection of a state tax on the use of property which has ceased to be a part of the bankrupt estate. It would appear to be so axiomatic that a bankruptcy court loses jurisdiction over property which has ceased to be a part of the bankrupt estate that an extensive discussion of the matter appears

unnecessary. This principle was clearly stated in *In re Oak Park Cleaners and Dyers,* 125 F.2d 420, 422 (Seventh Circuit). See, also, *In re Krull,* 295 Fed. 520, 521 (District Court E.D. N.Y.) Yet in the instant case the referee in bankruptcy purported to exercise such jurisdiction solely because many months earlier the property had been purchased from a trustee in bankruptcy who was liquidating the assets of a bankrupt estate. This attempt by the bankruptcy court to grant immunity from taxation to property no longer under the jurisdiction of the bankruptcy court is directly contrary to the principle of law stated by the United States Supreme Court in *Oklahoma Tax Comm'n v. Texas Co.,* 336 U.S. 342 at 353, 69 Sup. Ct. 561 at 567, as follows:

> "Despite the possibility that the prospect of taxation by the state may reduce the amount the United States might receive from the sale of its property, it is well established that property purchased by a private person from the Federal Government becomes a part of the general mass of property in the state and must bear its fair share of the expenses of government."

The similarity of a use tax and a property tax was clearly pointed out in *Henneford et al. v. Silas Mason Co. Inc., et al.,* 300 U.S. 577, at 582, 57 Sup. Ct. 524 at 526 where the Court said:

> "The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. * * * A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively." (Citations omitted.)

It follows that the bankruptcy court has no more jurisdiction to enjoin the collection of the California use tax from

a person using assets purchased from a trustee in bankruptcy than it has to enjoin the collection of a property tax from the purchaser, the liability for which arises in the period subsequent to the confirmation of the sale by the trustee in bankruptcy.

As the foregoing discussion has shown the bankruptcy court clearly exceeded its jurisdiction in enjoining the State of California from collecting use tax with respect to property which had ceased to be a part of the bankrupt estate. It should be noted, moreover, that the provisions of the California Sales and Use Tax Law provide a plain, speedy and adequate remedy by which the Milton J. Wershow Company may challenge the validity of the imposition of the use tax on the transaction here involved (California Revenue and Taxation Code, sections 6931, et seq.; *Corbett v. Printers & Publishers Corp.*, 127 F.2d 195 [Ninth Circuit]), Under such circumstances a federal district court is without jurisdiction to enjoin the collection of the state tax. (28 U.S.C. § 1341; *Corbett v. Printers & Publishers Corp., supra*). Moreover, the California Sales and Use Tax Law expressly prohibits the use of an injunction to restrain the collection of the taxes imposed under that law (California Revenue and Taxation Code, section 6931).

IV. The Milton J. Wershow Company Is Liable to the State of California for Use Tax on the Privilege of Using Tangible Personal Property in This State

I. INTRODUCTORY STATEMENT.

In the preceding section, it has been shown that the bankruptcy court had no jurisdiction to enjoin the State of California from collecting use tax from the Milton J. Wershow Company because of that Company's use of property which was no longer a part of the bankrupt estate. It has also been

pointed out that the injunction was not proper since the Milton J. Wershow Company had adequate remedies at law. Assuming, *arguendo*, that the bankruptcy court had jurisdiction, its order was, nevertheless, improper since, as the discussion which follows will show, the use tax was properly applicable to the Milton J. Wershow Company and the effect of the order of the bankruptcy court, enjoining the State of California from collecting or attempting to collect the use tax from the Milton J. Wershow Company, is to prevent the collection of a tax which the Company owes to the State under the substantive law here applicable.

2. THE MILTON J. WERSHOW COMPANY IS SUBJECT TO THE CALIFORNIA USE TAX SINCE IT PURCHASED TANGIBLE PERSONAL PROPERTY FROM A RETAILER FOR USE IN THIS STATE AND USED THE PROPERTY IN THIS STATE.

Section 6201 of the California Revenue and Taxation Code provides:

> "An excise tax is hereby imposed on the storage, use, or other consumption in this State of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this State at the rate of 3 percent of the sales price of the property, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent thereafter."

There is no dispute in this case that the property here in controversy was purchased by the Milton J. Wershow Company for use in this State and that the property was used by the company in this State (Tr. 71; California Revenue and Taxation Code section 6241 [Presumption that goods delivered in this State are purchased for use here]).

In ascertaining whether the use tax applies to the transaction here in controversy, it remains to consider if the Milton J. Wershow Company "purchased from a retailer"

within the meaning of section 6201 of the California Revenue and Taxation Code. There is no dispute between the parties that throughout the period in which he was operating the business of the Columbia Stamping and Manufacturing Corporation, George T. Goggin was a retailer by virtue of making numerous retail sales of tangible personal property on which he paid to the State of California the sales tax applicable to retailers (Tr. 52, 101). It is also undisputed that the assets which George T. Goggin sold to the Milton J. Wershow Company were used by Mr. Goggin in conducting the business of the bankrupt including the retail selling actively referred to above (Tr. 101). It is apparently the position of the appellee, however, as evidenced by the arguments which were made in the court below, that George T. Goggin ceased to be a retailer when he began to liquidate the assets of the bankrupt. It is therefore necessary to consider first, if, a person who has carried on retail selling activities in this state, loses his status as a retailer if he sells all the assets used in his business. The precise question was considered in two recent decisions of the California courts, *Market Street Railway Company v. California State Board of Equalization,* 137 A.C.A. 100, 290 P.2d 20, and *Sutter Packing Company v. California State Board of Equalization,* 139 A.C.A. 983, 294 P.2d 1083 (petition for hearing in California Supreme Court filed April 27, 1956) which were decided by different divisions of the District Court of Appeal for the First Appellate District. In both of these cases, it was held that a person who has become a retailer while conducting his business operations remains a retailer subject to the provisions of the Sales and Use Tax Law while selling his business assets.

Market Street Railway Company was a public service corporation engaged in the transportation business in San

Francisco and San Mateo counties. Between 1933 and 1948, it made approximately 900 retail sales of tangible personal property. In September of 1944, Market Street Railway Company sold its operative properties to the City and County of San Francisco and discontinued its transportation business. The value of the tangible personal property involved in this transfer was $2,891,578.83. In *Market Street Railway Company v. California State Board of Equalization,* 137 A.C.A. 100, 290 P.2d 20, the court held that Market was subject to a sales tax on all its retail sales including the sale of its operative properties to the City and County of San Francisco in September, 1944, and the additional liquidation sales it made thereafter, since Market Street Railway Company had become a retailer by virtue of its sales of obsolete equipment and since the statute provided no exemption for the sale of a business by a retailer. In reaching its decision, the court rejected an argument by Market Street Railway Company that the tax could not be applied to liquidation sales.

In *Sutter Packing Company v. State Board of Equalization,* 139 A.C.A. 983, 294 P.2d 1083, the factual situation was similar to that in the *Market Street Railway* case. Sutter Packing Company was primarily engaged in the processing and packing of fruits and vegetables for human consumption which were not subject to sales tax. However, Sutter Packing Company made numerous sales of used and obsolete equipment and supplies over a period of years on which it paid sales tax. In 1949, Sutter Packing Company decided to discontinue its packing operations. It immediately commenced negotiations for the sale of its remaining machinery and equipment. Several months after it had ceased its packing operations, it completed the sale of the remaining equipment and machinery used in its packing business for

the sum of $700,000. It was contended by Sutter Packing Company that it was not a retailer at the time it made the final sale of machinery and equipment, but that it had ceased to be a retailer when it discontinued its packing business and commenced the liquidation of its assets. In addition, Sutter contended that the sale of all its machinery and equipment was exempt as an occasional sale. The court held that Sutter Packing Company continued to be a retailer at the time it sold its remaining machinery and equipment in June of 1949. The court rejected Sutter's contentions that this transaction was exempt from taxation because it was a sale made in putting an end to a business. The court also held the transaction was not exempt as an occasional sale.

It is clear from the opinions in the *Market Street Railway Company* case and the *Sutter Packing Company* case that under California law a person does not cease to be a retailer when he is selling all of the assets used in his business operations. To support a contrary view, the appellee, George T. Goggin, in the court below, relied primarily on *California State Board of Equalization v. Goggin, trustee in bankruptcy of the Estate of West Coast Cabinet Works, Inc.,* 191 F.2d 726 (Ninth Circuit). The Court in that case apparently believed that it was the California law that a person ceased to be a retailer when he commenced the liquidation of the assets of his business. In both *Market Street Railway v. State Board of Equalization,* 137 A.C.A. 100, 290 P.2d 20, and *Sutter Packing Company v. State Board of Equalization,* 139 A.C.A. 983, 294 P.2d 1083, the taxpayers placed great reliance on *California State Board of Equalization v. Goggin,* 191 Fed. 2d 726, as supporting the proposition that the sale of assets in the liquidation of a business is not subject to the sales tax. The arguments were considered and rejected in the opinions of the District Court of Appeal in each of these cases as contrary to the

holdings of the California Supreme Court as to the meaning of the provisions of the California Sales and Use Tax Law.

It is clear, therefore, that to the extent that *California State Board of Equalization v. Goggin, trustee in bankruptcy of West Coast Cabinet Works, Inc.*, 191 F.2d 726, suggests that a person loses his status as a retailer when he liquidates his business, the case is directly contrary to the *Market Street Railway* case and to the *Sutter Packing Company* case, and does not correctly state the California law. As this Court recognized in *California State Board of Equalization v. Goggin, supra,* the construction of the California tax is a matter of state law which is binding upon the federal courts (191 F.2d 726, at 729).

Nor can it be contended that under California law, a trustee in bankruptcy liquidating the assets of a bankrupt estate is not included in the definition of the term "retailer". The California Sales and Use Tax Law defines retailer in Section 6015(a) of the Revenue and Taxation Code as follows:

> " 'Retailer' includes:
>
> (a) Every seller who makes any retail sale or sales of tangible personal property, and every person engaged in the business of making retail sales at auction of tangible personal property owned by the person or others."

An additional definition of retailer is set forth in section 6019 of the California Revenue and Taxation Code. Section 6019 provides:

> "Every individual, firm, copartnership, joint venture, trust, business trust, syndicate, association or corporation making more than two retail sales of tangible personal property during any 12-month period, *including sales made in the capacity of assignee for the benefit of creditors, or receiver or trustee in bank-*

ruptcy, shall be considered a retailer within the provisions of this part in his or its individual firm, copartnership, joint venture, trust, business trust, syndicate, associate or corporate capacity." (Emphasis added.)

It should be noted that the definition of retailer which is set forth in section 6019 was added to the Sales and Use Tax Law in 1951 and was not in effect in the period involved in *California State Board of Equalization v. Goggin, trustee in bankruptcy of West Coast Cabinet Works, Inc.,* 191 F. 2d 726. For this reason this Court did not have occasion to consider this additional definition of retailer in the opinion which it rendered in that case.

It is apparent from the definition in section 6019 of the California Revenue and Taxation Code that a trustee in bankruptcy who makes more than two retail sales in any 12-month period is a retailer under the California Sales and Use Tax Law. This definition of retailer does not distinguish between sales made in carrying on the business of the bankrupt on the one hand and sales made in liquidating the bankrupt's estate on the other.

From the foregoing discussion it is clear that in the instant case George T. Goggin was a retailer at the time he sold tangible personal property to the Milton J. Wershow Company. George T. Goggin was concededly a retailer while conducting the business operations of the Columbia Stamping and Manufacturing Corporation, and under the California statutes and the holdings of the California cases he did not cease to be a retailer when he liquidated the business of the bankrupt.

Since the Milton J. Wershow Company purchased tangible personal property from a retailer for use in this state and used the property here, the Company is liable for the use tax under the express language of section 6201 of the California Revenue and Taxation Code.

V. To Require George T. Goggin to Collect the Use Tax from the Milton J. Wershow Company Would Not Interfere with the Performance of His Functions as a Trustee in Bankruptcy

On the basis of the foregoing discussion, we believe it is very clear that a person purchasing tangible personal property for use in this State from a trustee in bankruptcy liquidating the assets of a bankrupt estate is subject to the California use tax. It is then necessary to consider if the use tax is to be collected from the consumer by the trustee in bankruptcy or if the State will be required to collect the use tax from each purchaser individually. It is important to note that once it is recognized that the purchaser is liable for the use tax, it should be a matter of indifference to the purchaser whether he pays the use tax to the trustee in bankruptcy who transmits it to the State, or whether he makes payment directly to this State. In either case, the amount of tax which the purchaser pays will be the same, although it probably would be simpler from the purchaser's standpoint to pay the tax to the trustee at the same time he pays the purchase price. From the standpoint of the State, it is highly desirable to have retailers collect the use tax from purchasers and transmit the tax so collected to the State rather than have the State collect the tax directly from the purchasers, particularly when a retailer is making a great number of relatively small sales. It is therefore provided in the California Sales and Use Tax Law as follows:

> "Every retailer maintaining a place of business in this State and making sales of tangible personal property for storage, use, or other consumption in this State, not exempted under Chapter 4 of this part, shall, at the time of making the sales, or if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage,

use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board." (California Revenue and Taxation Code, sec. 6203)

The retailer, when he collects the tax from the consumer, is, of course, obligated to pay the sum to the State.

It should be noted that a California retailer who, prior to collecting the use tax from the purchaser, transmits use tax to this State on behalf of the purchaser has a cause of action against the purchaser since, under the California statutes, the purchaser is primarily liable for the payment of the use tax. *Brandtjen & Kluge v. Fincher,* 44 Cal. App. 2d 939, 111 P.2d 979.

In the preceding sections of this brief, it has been shown that George T. Goggin was a retailer while conducting the affairs of Columbia Stamping and Manufacturing Corporation, including the liquidation of its assets. He was admittedly maintaining a place of business in this State while supervising the affairs of the bankrupt. Under the provisions of the California Sales and Use Tax Law set forth above he should, therefore, have collected use tax on the sale here involved and transmitted it to the State of California. In the discussion which follows, we shall show that there are no constitutional inhibitions which prevent his complying with the provisions of the California statute.

The constitutionality of the California statutory provision requiring the retailer to collect use tax from the purchaser has been upheld by the United States Supreme Court in *Felt & Tarrant v. Gallagher,* 306 U.S. 62, 59 Sup. Ct. 376. In the *Felt & Tarrant* case, goods were shipped into California in interstate commerce with title passing to the purchaser outside of California. It was contended by the

retailer, Felt & Tarrant Company, that requiring it to collect the California use tax from the purchaser on goods sold in interstate commerce would constitute an interference with such commerce in violation of the federal constitution. This argument was rejected by the United States Supreme Court. The holding of the *Felt & Tarrant* case was reaffirmed in *General Trading Company v. Tax Commission*, 322 U.S. 335, 64 Sup. Ct. 1028. In *General Trading Co. v. Tax Comm'n, supra,* the Supreme Court upheld the provisions of the Iowa use tax as applied to goods purchased from the General Trading Company, a Minnesota corporation, which shipped its merchandise from Minnesota to residents of Iowa for consumption in the latter state. In upholding the requirement that the use tax was to be collected from the purchasers by the Minnesota corporation, the Court said:

> "* * * The tax is what it professes to be—a non-discriminatory excise laid on all personal property consumed in Iowa. The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer—the Iowa resident who is paying taxes to sustain his own state government. To make the distributor the tax collector for the State is a familiar and sanctioned device. Monamotor Oil Co. v. Johnson, 292 U.S. 86, 93-94; Felt & Tarrant Co. v. Gallagher, supra." (322 US 335, at 338, 64 Sup. Ct. 1028, at 1029)

It should be noted that in *McLeod v. Dilworth Co.*, 322 U.S. 327, 64 Sup. Ct. 1023 which was decided the same day as the *General Trading Company* case an Arkansas *sales tax imposed on vendors* conducting their selling operations in the same manner as the *General Trading Company* was held invalid as violative of the commerce clause of the

United States Constitution. It is thus apparent that the State of California can require a retailer to collect use tax from its customers and remit it to the State even under circumstances in which the State could not constitutionally impose a sales tax on the retailer.

The United States Supreme Court has recognized that it is appropriate for a federal instrumentality to be required to collect a tax imposed on its customers even though there are constitutional inhibitions against the imposition of the tax on the instrumentality itself (*Colorado National Bank v. Bedford,* 310 U.S. 41, 60 Sup. Ct. 800). The *Colorado National Bank* case presented the following question: Could the State of Colorado require a national bank to collect from its customers a two percent tax measured by the bank's charges for the safe deposit service provided by the bank and to transmit the tax to the State when the State could not constitutionally impose such a tax on the bank itself. In upholding the validity of the tax, the Supreme Court said:

> "* * * The funds which were received by the State came from the assets of the user, not from those of the federal instrumentality, the bank. The Colorado Supreme Court holds the user is the taxpayer. The determination of the state court as to the incidence of the tax has great weight with us and, when it follows logically the language of the act, as here, is controlling. As the user directly furnishes the funds for the tax, not as an ultimate consumer with a transferred burden but by section 12 of the act as the responsible obligor, we conclude the tax is upon him, not upon the bank. The constitution or laws of the United States do not forbid such a tax.
>
> *The tax being a permissible tax on customers of the bank, it is settled by our prior decisions that the statutory provisions requiring collection and remission of the taxes do not impose an unconstitutional burden on*

> *a federal instrumentality.* * * *" (310 US 41 at 52, 6
> Sup. Ct. 800, at 805. Footnotes omitted; emphasi
> added)

The principle of *Colorado National Bank v. Bedford,* 31
U.S. 41, 60 Sup. Ct. 800, would clearly apply in the instan
case. As the prior discussion has shown it is established b
the terms of the California statute, the decisions of the Cali
fornia courts (*Chicago Bridge and Iron Co. v. Johnson,* 1
Cal. 2d 162, 119 P.2d 945) and the decisions of the Unite
States Supreme Court (*Southern Pacific Co. v. Gallagher*
306 U.S. 167, 59 Sup. Ct. 389) that the California Use Ta
is imposed on the purchaser rather than the vendor. There
fore, under the principle of the *Colorado National Ban*
case, *supra,* a trustee in bankruptcy, who is also a retaile
maintaining a place of business in this State, may be re
quired to collect the California use tax from purchasers.

Direct support for this conclusion is found in *City of Ne*
York v. Jersawit, 85 F2d 25 (Second Circuit), which is dis
cussed earlier in this brief. In the *Jersawit* case it was ex
pressly held that a trustee in bankruptcy, liquidating th
assets of the bankrupt, was required to collect the New Yor
City sales tax, the legal incidence of which is on the pur
chaser, since the collection of the tax would not interfer
with the performance of the trustee's functions in liquidat
ing the assets of the bankrupt estate. The Court said:

> "* * * Not only would the tax be on the purchase
> rather than on the trustee, but it would be equivalen
> to that imposed on all persons in the community simi
> larly situated. It is the policy of the courts ordinarily
> to treat such general taxes as valid. * * *" (85 F.2d 25
> at 27)

If, as the court held in *New York City v. Jersawit, supra*
the collection by the trustee in bankruptcy of the New Yor

City sales tax from a purchaser would not constitute an interference with the performance of the duties of a trustee in bankruptcy liquidating the assets of a bankrupt estate, it would certainly follow that the collection by a trustee in bankruptcy of the California use tax would not constitute such an interference. This is so since the purchaser's liability for the payment of the tax involved in the *Jersawit* case arose by virtue of the sale and was associated with the trustee's act of selling. The California use tax, on the other hand, involves a tax liability imposed not on the sale of the goods, but because of the use of the goods by the purchaser after he has acquired them.

The effect of the imposition of the California Use Tax in this case is merely to require the purchaser from a trustee in bankruptcy who uses the property he purchased in this State to bear the same burdens as any other person acquiring similar property for use in this State. The collection of use tax by the trustee will not interfere with the trustee's ability to dispose of the assets of the bankrupt estate since the purchaser will be required to pay the same amount of use tax regardless of whether the tax is collected from him by the trustee in bankruptcy or directly by the State of California. Since it would not interfere with the performance of his functions as a trustee in bankruptcy to collect the use tax from the purchaser and remit it to this State, the appellee, George T. Goggin, should have collected use tax from the Milton J. Wershow Company on the tangible personal property which he sold that Company for use in this State. For this reason, the order of the referee in bankruptcy confirmed by the District Court, enjoining the State of California and the State Board of Equalization from enforcing the use tax provisions of the California Sales and Use Tax Law with respect to this matter, was obviously erroneous.

CONCLUSION

On the basis of the foregoing discussion, it is clear that the bankruptcy court exceeded its jurisdiction in attempting to enjoin the State of California, and the California State Board of Equalization from collecting the use tax from the Milton J. Wershow Company. The Milton J. Wershow Company was liable for the use tax by virtue of exercising the privilege of using tangible personal property in this State. Moreover, the use tax on this transaction should have been collected by the appellee, George T. Goggin, and transmitted to this State. It is respectfully submitted that this case should be reversed and remanded with instructions to the District Court that the order of the referee in bankruptcy be set aside and that the appellant, California State Board of Equalization, be permitted to enforce the provisions of the California Use Tax law with respect to the transaction here involved.

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